

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

BRENT M KINGERY
Claimant

APPEAL NO. 10A-UI-06746-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

OC: 04/04/10
Claimant: Appellant (2R)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 28, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 28, 2010. Claimant participated. The claimant was represented by Phil Miller, attorney at law. Employer participated by Jessica Shepherd, human resources associate. The record consists of the testimony of Jessica Shepherd; the testimony of Brent Kingery; Claimant's Exhibit's A-I; and Employer's Exhibit's 1-18.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a pork processing plant located in Ottumwa, Iowa. The claimant was hired as a full-time production worker on the second shift on August 3, 2009. He was terminated on April 6, 2010, after he violated a "last chance attendance agreement".

The employer has a no-fault attendance policy. If an employee reaches 10 points, the employee is terminated. Points are assessed for tardiness and absence. The claimant accumulated 10 ½ points on March 15, 2010. He was offered what the employer calls a "last chance attendance agreement." The claimant agreed that he would not have any additional points until September 19, 2010.

The claimant was absent on April 3, 2010, and April 5, 2010. He was advised by his treating psychologist to miss work due to stress and depression. The claimant properly notified the employer that he would not be at work. However, since the claimant violated the last change attendance agreement, he was terminated on April 6, 2010.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(). The employer has the burden of proof to show misconduct.

The evidence established that the claimant did violate a last chance employment agreement and missed work on April 3, 2010, and April 5, 2010. The claimant testified that he was off work on the advice of his treating psychologist for stress and depression. The claimant properly notified the employer of his absence. Under Iowa law, absence due to illness is deemed

excused if the employer is properly notified. Accordingly, the claimant was not discharged for misconduct that disqualifies him from receiving unemployment insurance benefits.

The testimony from the claimant at the hearing raises questions as to whether the claimant was able and available for work when he applied for unemployment insurance benefits on April 4, 2010. The claimant had had a work-related injury to his foot and possibly his knee and was being treated for stress, anxiety and depression by a licensed psychologist. Able and available was not an issue listed on the hearing notice. This matter is remanded to the claims section to determine if the claimant was able and available for work.

DECISION:

The decision of the representative dated April 28, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible. The issue of whether the claimant was able and available for work is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs